Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

1868
July 16.

JAGANNATH PAL *v.* BIDYANAND. *

Bairagis—Right to Property—Limitation Act (XIV. of 1859), s 1, c. 12.

A Hindu becoming a Bairagi, if he chooses to retain possession of, or to assert his right to property to which he is entitled, may be doing an act which is morally wrong, but in which he will not be restrained by the Courts.

A. became a Bairagi and went on a pilgrimage. He alleged that before his departure he made over his property to B., on the condition that it should revert to him on his return. B. sold it to C. Upon his return after several years, A. claimed the property from C., who refused to give up possession. D. purchased A's rights, and then sued the widow of C. to obtain possession. She denied that the property was made over to B. upon trust for A. on his return, and contended that the suit was barred under clause 12 of section 1 of Act XIV. of 1859. The lower appellate Court held that it was not barred, on the ground that B's possession was not adverse. On special appeal, the case was remanded, that it might be found whether B. had been in possession in trust for A., or adversely to him for more than 12 years.

THIS suit was for recovery of possession by right of purchase. The plaintiff alleged that the disputed land belonged to one Kishor Ram, who in the year 1263 (1856) went on a pilgrimage, leaving the property in charge of his nephew, the defendant, Bidyanand, on condition that if he returned, it was to be restored to him; that Kishor Ram returned in Paush 1269 (December 1862), and demanded possession of the property, but Bidyanand refused to make it over to him. Kishor Ram then sold his right to the plaintiff, who, accordingly, instituted this suit.

Bidyanand stated that Kishor Ram had become a Bairagi more than 12 years ago, and went away leaving the property unprovided for; that he (Bidyanand) being a co-sharer, held possession of the property for more than 12 years; and that in Paush 1269 (December 1862), he sold the property to one Fyzulla, deceased, whose widow, Sabak Bibi, ought, he contended, to be made a defendant.

* Special Appeal, No. 336 of 1863, from a decree of the Judge of Sylhet, reversing a decree of the Moonsiff of that district.

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Sabak Bibi was, accordingly, made a defendant. She raised the defence that the suit was barred by limitation, and that Kishor Ram having become a Bairagi, had lost all right and interest in the property, which thereupon vested in his co-sharer, Bidyanand.

The Moonsiff found that Kishor Ram went on a pilgrimage, leaving the property in the hands of his nephew, Bidyanand, and held that, although for the time being the latter was in possession, Kishor Ram, on his return, was entitled to claim back his property; and that there was nothing in the Hindu law which prevented him from doing so.

On appeal the Judge reversed this judgment, on the authority of *Sheikh Matiullah* v. *Radhabinod Misser* (1). He held that Kishor having become a Bairagi, his right and interest in the property were totally extinguished; and that Bidyanand the next heir, had succeeded to the same. He held, that the possession of Bidyanand was not adverse, and that the suit was not barred. "Adverse possession implies a contest, and in this case there could be none, because Kishor was civilly dead; and even Hindus, when dead, cannot contest. There was and could be no conflict as to title between Kishor and his nephew, for Kishor having died (civilly), his title died with him."

Baboo *Bama Charan Banerjee* for special appellant.—The view of the Hindu law taken by the Judge is erroneous. The mere circumstance of a person turning a Bairagi does not divest him of his right to the property. *Tilak Chandra* v. *Shama Charan Prakash* (2). On the contrary, Bairagis are competent to inherit. Vyavastha Darpana, p. 323.

Mr. *C. Gregory* (*Debendra Narayan Bose* with him), for respondent, contended in support of the judgment of the lower Court, on the point of Hindu law, but took an objection under section 348 of Act VIII. of 1859; and contended, on the point of limitation, that the suit of the plaintiff was barred, and that section 5 of Act XIV. of 1859 did not apply.

The judgment of the Court was delivered by

JACKSON, J.—The plaintiff in this case was a co-sharer in

(1) 12 S. D. R., 596. (2) 1 W. R., 209.

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certain joint immovable property. It seems that some years previous to the institution of the suit, the time being variously stated as from 10 or 11 to 13 or 14 years, the plaintiff became a Bairagi, and, as he says, "relinquished the world" or "Sanshâr," set out on a pilgrimage to various places sacred among the Hindus.

He alleges, that before his departure he made over his share of the family property to the care of his nephew, Bidyanand, otherwise called Thakurdhan, stipulating only that, in the event of his return, the property was to revert to him.

During his absence, Bidyanand seems to have sold the property to one Fyzulla, since deceased, who was the husband of the defendant, Sabak Bibi, now in possession.

The plaintiff, therefore, sues to recover possession of such property, which is withheld from him by the defendant. The Moonsiff before whom the case first came, held that the plaintiff's allegation being found to be true, he was entitled to regain possession of his property, notwithstanding that he had become a Bairagi.

The Judge, on appeal, held, on the contrary, that the plaintiff having become a professed Bairagi was thereby civilly dead, and that his nephew, as heir, thereupon entered on immediate possession of the property; and, consequently, the defendant's vendor had a complete title, and the plaintiff's suit must be dismissed.

The defendant, it should be mentioned, had also set up the plea of limitation, contending that the plaintiff having been out of possession, without any trust, for more than 12 years, his suit was barred, but the Judge considered that limitation did not apply. The plaintiff now appeals specially, and urges that the Judge's view of Hindu law is incorrect.

It appears to us indisputable that a Hindu becoming a Bairagi, if he chooses to retain possession of, or to assert his right to, property to which he is entitled, does an act which may be morally wrong, but in which he will not be restrained by the Courts. If, therefore, it were clear that the plaintiff on quitting his home had made over his share of the property in trust to his nephew, and that that nephew, in violation of such trust,

had sold that property to the defendant, we should have no hesitation in reversing the decision of the Judge, and ordering possession of the property to be given to the plaintiff. But before we can do this, the question of limitation must first be disposed of.

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The defendant denies that any trust existed in respect of this property, and she alleges that at the time, and in consequence of the plaintiff becoming a Bairagi, the nephew did, in fact, as of right, take possession, and hold adversely to the plaintiff, and subsequently sold the property to her husband, and that such adverse holding has continued for more than 12 years. The plaintiff's evidence is to the contrary, but the Judge has not found distinctly on this point.

It is, therefore, necessary to remand the case to the lower appellate Court, in order that it may be found whether, as alleged by the plaintiff, the defendant's vendor held this property in trust for the plaintiff, or, as alleged by the defendant, adverse possession had continued for more than 12 years. In the latter event the suit must be dismissed; if otherwise, the plaintiff is entitled to a decree.

Before Mr. Justice Bayley and Mr. Justice Macpherson.

PARESHMANI DASI *v.* DINANATH DAS.*

1868
July 18.

Hindu Law—Succession— Son of Deaf and Dumb Son.

According to Hindu law, the son of a deaf and dumb man, born after the death of his grandfather, cannot succeed to the estate descended from his grandfather.

A. died leaving four sons: one B. was born deaf and dumb. B. lived in commensality with his brothers. Some time after A.'s death, a son was born to B. *Held*, B.'s son was not entitled to succeed as heir to a share of the property descended from A.

THIS was a suit on behalf of an infant, for recovery of one-fourth share of ancestral property.

The defence was that the father of the infant was born deaf and dumb; and was, therefore, under the Hindu law, incapable of inheriting; and that the infant was born long after the death of his grandfather, and, therefore, he had no right to any share of the estate which had descended from his grandfather.

* Special Appeal, No. 58 of 1868, from a decree of the Judge of Burdwan, reversing a decree of the Sudder Ameen of that district.